

ORIGINAL  
FILE

HARRIS  
BEACH &  
WILCOX

ATTORNEYS AT LAW

1611 NORTH KENT STREET SUITE 1000  
ARLINGTON, VIRGINIA 22209  
(703) 528-1600

RECEIVED

NOV 23 1992

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

November 23, 1992

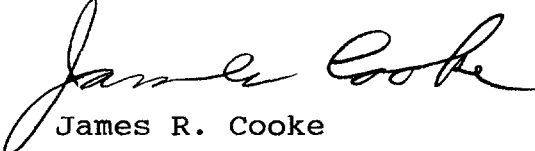
Ms. Donna R. Searcy  
Secretary  
Federal Communications Commission  
Washington, D. C. 20554

Dear Ms. Searcy:

Forwarded herewith on behalf of Reese Brothers, Inc. are an original and eleven copies of its Petition for Reconsideration in CC Docket No. 92-90.

Should you have any questions concerning this matter, please contact me.

Very truly yours,

  
James R. Cooke

Enclosures

No. of Copies rec'd 0+11  
List A B C D E

THE GRANITE BUILDING 130 EAST MAIN STREET  
ROCHESTER, NEW YORK 14604-1687 (716) 232-4440

20 CORPORATE WOODS BOULEVARD  
ALBANY, NEW YORK 12211-2391 (518) 427-9700

50 FOUNTAIN PLAZA SUITE 1260  
BUFFALO, NEW YORK 14202-2212 (716) 854-5300

121 EAST SENECA STREET P.O. BOX 580  
ITHACA, NEW YORK 14851 (607) 273-6444

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D. C. 20554

ORIGINAL  
FILE  
ORIGINAL

In the Matter of )  
 )  
The Telephone Consumer ) CC Docket No. 92-90  
Protection Act of 1991 )  
 )

RECEIVED

To: The Commission

NOV 23 1992

PETITION FOR RECONSIDERATION

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Reese Brothers, Inc. ("Reese Brothers"), by its attorneys and pursuant to Commission Rule 1.429, hereby requests that the Commission reconsider and modify Rule 64.1200(f)(3)(iii) as adopted in the Commission's Report and Order in CC Docket No. 92-90, 57 Fed. Reg. 48333, October 23, 1992. In support of this petition, the following is respectfully shown.

I. Summary

1. Reese Brothers filed comments herein urging that the Commission exempt calls made both by and on behalf of nonprofit organizations from the restrictions of Rules 64.1200(a)(2) and (e). Joint Reply Comments filed herein by a group of major national and regional non-profit organizations<sup>1/</sup> supported this recommendation.

---

<sup>1/</sup> See June 25, 1992 Joint Reply Comments of Non-Profit Group, which was composed of: American Institute for Cancer Research; California Consortium for the Prevention of Child Abuse; Federation on Child Abuse and Neglect; "Just Say No" International; Mothers Against Drunk Driving; and Vietnam Veterans Memorial Fund, Inc.

2. Responding to the concerns expressed in Reese Brothers' Comments, the Commission modified the original language of what is now Rule 64.1200(c) to make clear that calls made both by and on behalf of nonprofits are exempt from the restrictions of Rule 64.1200(a)(2). In contrast, Rule 64.1200(f)(3)(iii) does not specifically exclude calls made on behalf of nonprofits from the definition of "telephone solicitations", thus arguably making them subject to the "do not call list" requirements of Rule 64.1200(e). The specific language of Rule 64.1200(f)(3)(iii) excludes only calls made by a nonprofit from the definition of telephone solicitations.

3. Reese Brothers urges that Rule 64.1200(f)(3)(iii) be revised to make clear that calls made both by and on behalf of nonprofits are excluded from the requirements of Rule 64.1200(e).

## **II. The Specific Language of Rule 64.1200(f)(3)(iii) Appears Inconsistent with Commission Intent**

4. In its Notice of Proposed Rule Making herein ("Notice")<sup>2/</sup> the Commission proposed, inter alia, specific rules to implement the provisions of the Telephone Consumer Protection Act of 1991 ("TCPA") relating to artificial voice and recorded message telephone calls made via automatic dialing equipment to residential telephones. Congress and the

---

<sup>2/</sup> 7 FCC Rcd. 2736 (1992).

Commission both concluded that such computer-generated calls using recorded messages are the most intrusive telemarketing calls. Despite the more intrusive nature of such calls, the Commission proposed to exempt nonprofit organizations from the general prohibition against automatically dialed, recorded message calls to residential telephones. See Notice, Paragraph 12, and then proposed Rule 64.1100(c).

5. In its Report and Order, the Commission adopted the exemption as proposed. In doing so, the Commission revised what is now Rule 64.1200(c) to make clear that the exemption applied to calls made both by and on behalf of nonprofits.

6. Rule 64.1200(e) establishes the "do not call list" requirement and makes it applicable to all "telephone solicitations" as defined in Rule 64.1200(f)(3). Item (iii) of subsection (3) excludes calls made by nonprofits from the definition of "telephone solicitation" but is silent as to calls made on behalf of nonprofits. Reese Brothers believes it clear from careful reading of the TCPA and the Commission's Notice and Report and Order herein that both Congress and the Commission intended to exclude "live" operator calls made both by and on behalf of nonprofits from the definition of telephone solicitations. However, that intent is not entirely clear from a literal reading of Rule 64.1200(f)(3)(iii) alone.

7. Reese Brothers is concerned that the differing language of the exemptions in Rules 64.1200(c) and (f)(3)(iii) could be construed as a deliberate regulatory distinction by

the Commission. Reese Brothers believes that no such distinction was intended by the Commission and urges that Rule 64.1200(f)(3)(iii) be revised to eliminate any possible ambiguity.

8. Reese Brothers concern is heightened by the "principal" of regulatory construction that an agency may be presumed to have intended a different result when it uses different language in different portions of the same rule. Such a presumption would arguably have particular force where, as here, the significance of the differing language was brought to the attention of the agency before the rule was adopted and it modified the language of only one of the Rule's provisions.

**III. There is No Sound Public Policy  
Basis for Treating Calls Made "By"  
Nonprofits Differently Than Calls  
Made "On Behalf Of" Nonprofits.**

9. As Reese Brothers demonstrated in its Comments herein, there are compelling public policy reasons for exempting all calls made for nonprofits from the requirements of Rules 64.1200(a)(2) and (e). Applying additional regulatory burdens to calls made by independent telemarketers on behalf of nonprofits will reduce the economic benefits which nonprofits obtain by using independent firms.

10. As both Reese Brothers and the Non-Profit Group explained in their filings herein, economic considerations have caused nonprofits to make increasing use of highly

trained telemarketers rather than volunteers to handle fundraising and other telemarketing campaigns. A majority of the fundraising/membership efforts of nonprofits are now conducted by specially trained, paid staffs of telemarketers -- some employed directly by the nonprofits and some working for independent telemarketing firms.

11. Independent telemarketers are now a highly cost-effective resource for nonprofits. In the interest of economy, even the largest nonprofits use independent telemarketers at least to handle peak work loads and specialized telemarketing tasks. Many smaller nonprofits rely exclusively on independent telemarketers because they simply cannot justify the cost of maintaining in-house staffs of highly skilled and trained telemarketers. There is no sound public policy basis for requiring an independent telemarketer to maintain a "do not call list" for a nonprofit when the organization itself is not required to maintain such a list when telemarketers on its own payroll may be making identical calls.

12. If calls made by independent telemarketers on behalf of nonprofits are subject to greater regulatory burdens than calls made by employees of nonprofits, the cost of using independent telemarketing firms will be increased to the ultimate detriment of the nonprofits. Such disparate treatment would impose a special burden on the smaller nonprofits (typically the newer groups and those advocating

more controversial positions) that cannot afford in-house telemarketers.

**IV. Exclusion of Calls Made On  
Behalf Of Nonprofits Is  
Required Under the First Amendment**

13. As Reese Brothers also demonstrated in its Comments, a line of U.S. Supreme Court decisions has recognized that the speech of nonprofits -- specifically including speech devoted to their fundraising activities -- is entitled to the plenary protection of the First Amendment. The Court has held that the speech of such nonprofits is entitled to full constitutional protection whether it is delivered directly by the organization or through the conduit of an independent telemarketing service. Disparate regulatory treatment of in-house and independent telemarketing activities which would disadvantage smaller nonprofits would certainly contravene those constitutional protections.

**V. Recommended Change to Rule 64.1200(f)(3)(iii)**

14. In order to give effect to what Reese Brothers believes was the clear intent of both the Commission and Congress, Rule 64.1200(f)(3)(iii) should be revised to read as follows:

(iii) by or on behalf of a tax-exempt  
nonprofit organization.

The foregoing language will clearly exempt calls made on behalf of nonprofits from the definition of telephone

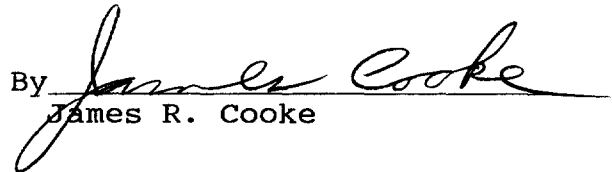
solicitations and thus assure that all calls made for nonprofits are exempted from both Rules 64.1200(a)(2) and (e).

**VI. Conclusion**

15. In view of the foregoing and the additional public interest considerations detailed in the Comments of Reese Brothers and the Joint Reply Comments of Non-Profit Group herein, Reese Brothers urges that the Commission reconsider and modify Rule 64.1200(f)(3)(iii) as described above to more precisely reflect what it believes was the Commission's clear intent.

Respectfully submitted,

**REESE BROTHERS, INC.**

By   
James R. Cooke

Harris, Beach & Wilcox  
Suite 1000  
1611 North Kent Street  
Arlington, Virginia 22209  
(703) 528-1600

Its Attorneys

November 23, 1992